EXPLANATORY MEMORANDUM TO

THE FOOD (MISCELLANEOUS AMENDMENT AND REVOCATION) (ENGLAND) REGULATIONS 2013

2013 No. 466

1. This explanatory memorandum has been prepared by the Food Standards Agency (FSA) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument will revoke the Arsenic in Food Regulations 1959[1] and its amendments, the Chloroform in Food Regulations 1980[2] and the Ungraded Eggs (Hygiene) Regulations 1990[3] and also make an amendment to the Food Labelling Regulations 1996[4].

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In a letter dated 9th March 2011 the JCSI requested a memorandum on the following point: "*Explain how this instrument (which appears to replicate an unnoticed error in S.I. 2009/2801) has the effect stated in the Explanatory Note and Explanatory memorandum. In particular, should the reference to the amendments made by regulation 2 of S.I. 2011/402 have been a reference to the amendments made by paragraphs (1) to (5) and (7) of regulation 2 of S.I. 2008/1188?*" The Food Standards Agency acknowledged the error, and regulation 2 of the attached instrument is designed to rectify it.

4. Legislative Context

4.1 The Arsenic in Food Regulations are based on science which is now out of date; they set a statutory level for total arsenic that has been amended to take account of more recent scientific studies. Total arsenic is the sum of all different chemical forms in which arsenic can exist in the environment. The toxicity of arsenic is dependent on the chemical forms, and it has been shown that the organic forms of arsenic are less harmful whereas the inorganic forms can cause cancer. As such, inorganic arsenic present in food at the statutory level set out in the Arsenic in Food Regulations may be considered 'unsafe' under more recent General Food Law (Regulation (EC) No. 178/2002 of the European Parliament and the of the Council of 28 January 2002 ("General Food Law"). Currently, if a food incident occurs in relation to arsenic in food, a risk assessment is carried out and any necessary action is taken under the General Food Law – the Arsenic in Food Regulations are no longer required to ensure consumer protection.

4.2 The Chloroform in Food Regulations lay down restrictions regarding chloroform added to food. The Regulations prohibit the sale or importation of food containing added chloroform under any circumstances. It is considered by the FSA that an equivalent level of protection of public health is achieved under General Food Law, and these Regulations are no longer necessary.

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[1] SI 1959 No. 831, SI 1960 No. 2261 and SI 1973 No.1052
[2] SI 1980 No. 36,
[3] SI 1990 No. 1323
[4] SI 1996 No. 1499

4.3 There is now very limited use of chloroform in the food industry, which means that even an isolated contamination incident is highly unlikely. At the time the Chloroform in Food Regulations were made an absolute prohibition on the presence of chloroform was required because detection was not possible at the very low levels achievable now. Having a limit set at the limit of detection is now inappropriate, as detection with powerful modern analytical techniques can be achieved at levels that are of no relevance for safety.

4.4 The Ungraded Eggs (Hygiene) Regulations 1990 were introduced to prohibit the retail sale of cracked eggs by producers on their own farms, in local public markets or by door to door selling because of the potential food safety risk from such products.

5. Territorial Extent and Application

5.1 This instrument applies to England only.

5.2 Separate but parallel legislation (where applicable) is being made in Scotland, Wales and Northern Ireland.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 In April 2011 the Government launched in England the Red Tape Challenge (RTC) initiative[5] with the purpose of getting comments from business, enforcement authorities and the public on how the burden of legislation may be reduced. On 6th May 2011 most of the FSA's legislation was published on the RTC website under the Hospitality Theme and remained on the site until 2nd June 2011. The FSA has a number of initiatives being delivered under the RTC[6], including developing a simplified system of food safety legislation. One initiative is the revocation of the Arsenic in Food Regulations as amended, the Chloroform in Food Regulations and the Ungraded Eggs (Hygiene) Regulations – (the equivalent legislation on Ungraded Eggs in Scotland was revoked on 1st January 2006 and the revocation of that legislation has had no detrimental effect on consumer health). The RTC applies to England only.

7.2 Having reviewed these Regulations, the FSA considers that an equivalent level of protection of public health is provided under General Food Law, which prohibits the sale or supply of unsafe food. This renders superfluous the specific controls on arsenic, chloroform which are out-of-date and on cracked ungraded eggs.

[5] http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/
[6] http://www.food.gov.uk/enforcement/regulation/betregs/red-tape-challenge/

8. Consultation outcome

Formal Public Consultation

8.1 In England the FSA conducted a formal public consultation from 4th September to 30th November 2012, seeking comments on the draft instrument. Forty two stakeholders were consulted on these proposals; these included food industry organisations, sector specific organisations, consumer groups, non-government organisations, local enforcement authorities (including port health authorities), public and independent laboratories and others with an interest in food safety legislation.

8.2 The FSA received 5 responses to the consultation; one from the East of England Trading Standards Association (EETSA), one from a research institute, one from the Trading Standards Institute (TSI), one from the Government Chemist and one from industry.

8.3 Of the five responses received only the East of England Trading Standards (EETSA) was of the opinion that neither the Arsenic in Food Regulations nor the Ungraded Eggs (Hygiene) Regulations were redundant. EETSA provided recent examples of when the Arsenic Regulations were cited by Trading Standards, particularly with regard to edible clays as evidenced by warnings issued by the FSA earlier this year and in 2009. EETSA speculated that the cost of enforcement may increase, as there may be more room for legal argument over interpretation and the cost of analysis in their view would be likely to double in order to analyse for total arsenic and for inorganic arsenic. This view however, was not supported by the other respondents.

8.4 The FSA notes EETSA's concerns about having defined arsenic limits in place for clarity and enforcement; we are of the view however, that defined limits do not necessary mean that these limits are correct or valid and or protective of consumers. On this basis, the FSA considers that the arsenic in food Regulations are no longer necessary; General Food Law is adequate for consumer protection and enforcement purposes. Furthermore, it is also likely that EU limits will be agreed for problematic foods such as rice and some algae, in the near future; when agreed, the limits will be set for inorganic arsenic rather than total arsenic.

8.5 In relation to ungraded eggs, EETSA commented that the current Regulations provide clarity for businesses and enforcers alike; in their view there is no clear link between the sale of cracked eggs and a prohibition on the sale of eggs which are unsafe.

8.6 In response to EETSA's concerns regarding the revocation of the ungraded eggs Regulations, the FSA continues to consider these Regulations redundant and believes that there is an equivalent level of public health protection achieved under General Food Law, which prohibits the sale or supply of unsafe food and as cracked eggs are considered inherently unsafe, sales would be prohibited under General Food Law. This would be appropriate and protection proportionate to the risk. Furthermore, there has been no detrimental effect on consumer protection since the ungraded eggs Regulations were revoked in Scotland in 2006. The proposal to revoke these and the chloroform and arsenic in food Regulations is supported by the other four respondents.

8.7 With regards to the RTC, EETSA commented that this exercise was intended to reduce the burden on business; they felt that in the case of the revocations discussed above, this is unlikely to be the case. Businesses would have to look elsewhere in other less specific legislation; the view of EETSA is that the burden is likely to increase because in their opinion there is less clarity and more room for inconsistency of application.

8.8 The Food and Drink Federation (FDF) circulated the consultation documents to its Residues and Contaminants committee which discussed them at a recent meeting; its members in general agreed with the FSA's assessment that the impact on business is likely to be minimal and that consumer safety would be adequately protected under General Food Law. The proposal to revoke the three sets of national legislation is supported by the FDF and the other respondents, who felt that the Regulations were redundant and out-of-date, and agreed that an equivalent level of consumer protection is achieved under General Food Law. The FDF also agreed that it made sense to revoke the three Regulations under the RTC.

8.9 A full summary of the comments received in response to the consultation will be published on the FSA's website.

9. Guidance

9.1 In relation to regulation 2 of the instrument, there is guidance to compliance with existing allergen labelling guidance that can be found at http://www.food.gov.uk/business-industry/guidancenotes/labelregsguidance/allergenlabelguide2009

10. Impact

10.1 It is anticipated that only negligible incremental impact on industry will arise from these Regulations; accordingly, the FSA has not produced an Impact Assessment on this occasion.

10.2 There is no particular impact on charities or voluntary bodies, rural areas or on members of the ethnic communities of any particular racial group that can be identified. No comments were received from such bodies on the effects of the proposal on them.

10.3 Stakeholders were asked to comment on the FSA's view that there was no impact on industry or enforcement bodies and did not identify any such costs of the proposal. However comments received from EETSA indicated that the costs for enforcement may increase and the cost of analysis is likely to double for total and inorganic arsenic. The FSA acknowledges EETSA's comments but have also noted that industry or other enforcement/analytical bodies did not comment on the issue of costs associated with the proposal. For the reasons given above the FSA considers that in most cases, if not all, it will only be necessary to analyse for inorganic arsenic and not for total arsenic as well.

11 Regulating small business

11.1 The instrument will apply to all businesses, small and large.

12 Monitoring & review

Monitoring

12.1 The Agency will work with Local Authorities and Port Health Authorities where problems arise or suspected infringements of the instrument arise. The effectiveness of the instrument will be also be monitored via general feedback from industry and Enforcement Authorities.

13 Contact

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